United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 937

Case No. 1029: TOPPIN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Victor Yenyi Olungu; Ms. Marsha Echols;

Whereas at the request of Ainsley Toppin, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended until 30 September and 31 December 1997 the time-limit for the filing of an application with the Tribunal;

Whereas, in February 1998, the Applicant filed an undated application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 April and 31 July 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 23 July 1998, the Applicant, after making the necessary corrections, again filed an application the pleas of which read as follows:

"II. PLEAS

...

14. ... the Applicant respectfully requests the Tribunal *to find*:

(a) That the Respondent's decision denied the Applicant full restitution of compensation awarded to him by the Joint Appeals Board;

(b) That the delay of 27 months in reaching a decision in this case by the Joint Appeals Board was tantamount to a denial of justice;

(c) That although the Respondent agreed to pay the Applicant only one year's net base salary at the rate in effect at the time of his separation from service (...), more than seven (7) months elapsed before such payment was made (...).

15. ... *to order*:

(a) The Respondent to pay the Applicant full restitution of salary in accordance with the award made by the Joint Appeals Board together with interest;

(b) The Respondent to compensate the Applicant for the delay in payment by paying interest on the total amount involved;

(c) The Respondent to compensate the Applicant in the amount of $3,000 or any other sum the Tribunal decides upon for the injury he has suffered due both to the delay in payment and to the delay in reaching a decision."

Whereas the Respondent filed his answer on 27 May 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 25 August 1977, on a fixed-term appointment for one year, as a Field Service Officer (Vehicle Mechanic) with the United Nations Emergency Force (UNEF), Ismailia, Egypt. The Applicant served thereafter on a series of fixed-term contracts with UNEF, as well as with the United Nations Truce Supervision Organization, the United Nations Interim Force in Lebanon (UNIFIL), the United Nations Iran-Iraq Military Observer Group and the United Nations Operation in Somalia

(UNOSOM). On 30 May 1994, he was separated from service due to unsatisfactory performance upon the expiration of his fixed-term appointment.

On 2 November 1993, the Chief Transport Officer, UNOSOM, as First Reporting Officer, completed the Applicant's performance evaluation report (PER) covering the period from 7 February through 8 October 1993. The Chief Transport Officer, UNOSOM, rated the Applicant "D" in items 1, 2, 4, 6, 8-10 and 13, "E" in items 3, 5 and 11, and "F" in items 7 and 12. In Section II, Part B, paragraph 1, he noted that the Applicant had left UNOSOM before completing Part A of the PER and that he had had "at least five private discussions, between May and October, during which [he had] expressed [his] concern at [the Applicant's] lack of performance and/or compliance with [his] directions."

On 4 November 1993, the Chief, Technical Services, UNOSOM, as Second Reporting Officer, completed and signed Section IV of the Applicant's PER giving him an overall rating of "An unsatisfactory performance". He noted that he had "known [the Applicant] for only three weeks; however, all indications [were] that [the Applicant] failed to meet the standard expected of a Field Service Officer. [The Applicant] was uncooperative, surly, argumentative. His file should be reviewed before any extension of contract."

On 1 February 1994, the Applicant's fixed-term contract was extended for a further period of four months, i.e., until 30 May 1994.

On 15 March 1994, the Officer-in-Charge, Administration, UNIFIL, forwarded to the Director of Administration, UNOSOM, the Applicant's PER for the period February 1993 to 24 January 1994, requesting him to complete the PER, in view of the forthcoming 1994 Field Service Promotion Review.

On 23 March 1994, the Director of Administration, UNOSOM, sent to the Officer-in-Charge, Administration, UNIFIL, a copy of the Applicant's PER covering the period 7 February - 8 October 1993, forwarding the original to Headquarters.

On 18 April 1994, the Applicant submitted his rebuttal of the PER on the grounds that it did not represent his actual and true performance.

On 21 April 1994, the Staff Administration and Monitoring Service, Office of Human Resources Management, advised the Chief, Field Personnel Section, Field Operations Division, Department of Peace-keeping Operations, that, in view of the various poor ratings in the Applicant's PER and in view of the unfavourable observations of the First and Second Reporting Officers in UNOSOM, the Applicant's fixed-term appointment should not be renewed.

On 27 April 1994, the Applicant was advised that, in light of his performance, there would be no extension of his fixed-term appointment beyond 30 May 1994.

By letter dated 5 May 1994, the Applicant requested the Secretary-General to review the decision not to extend his contract.

On 10 October 1994, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 4 February 1997. Its considerations, conclusions and recommendations read, in part, as follows:

> "***Considerations***
>
> 33. The Panel considered, firstly, the Appellant's contention that the decision not to renew his fixed-term appointment was based upon a PER which was flawed with a variety of procedural irregularities, distortions and abuse of authority.
>
> 34. In considering this issue, the Panel noted that 'the Tribunal's jurisprudence has consistently maintained that while under the Regulations and Rules governing fixed-term contracts, the Respondent has the unquestioned right to terminate contracts, it must nevertheless be ensured that the decision to terminate must not be tainted by caprice, prejudice, falsehood or any other serious lack of due process. ...'"
>
> 35. The Panel noted that the Respondent had not denied that there were procedural irregularities in relation to the Appellant's PER covering his assignment to UNOSOM, or that although the Appellant had availed himself of the rebuttal process and submitted a written rebuttal statement on 18 April 1994, the Administration had taken no action in furtherance of the process. The position of the Respondent, however, was that whatever procedural irregularities there might have been were not

of such a substantive nature as to change the situation or taint the decision ultimately taken not to extend the Appellant's fixed-term appointment beyond 30 May 1994.

...

42. The Panel wondered what might have been the underlying motivation for the distortion of the ratings contained in the Appellant's PER for the period in question.

43. The Panel was of the view that the contents of [the Acting Chief Transport Officer's] confidential memorandum and [the Officer-in-Charge, Administration, UNIFIL's] confidential/no distribution fax message clearly violated the Appellant's rights as a staff member; for, besides the fact of their distortion of the ratings contained in the Appellant's PER, they contained no provision for rebuttal and were thus inappropriate for the purpose of recommending against the extension of the Appellant's fixed-term appointment.

44. In considering the Appellant's request that the JAB should recommend his reinstatement and compensation for loss of salary since the non-extension of his appointment 'in view of his past record of service to the cause of the United Nations', the Panel agreed that the Appellant had a legitimate expectation of continued employment with the Organization because of his previous service and good performance.

...

46. The Panel noted, however, that in 1982, the General Assembly adopted resolution 37/126, which provided, *inter alia*:

> '... [S]taff members on fixed term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment'. Section IV, para.5.

47. The Panel recalled that at the time of the non-extension of the Appellant's fixed-term appointment on 30 May 1994, he had been in the employ of the United Nations for seventeen years less three months, having joined the Organization on 25 August 1977. Under the provision of General Assembly resolution 37/126, therefore, the Appellant upon completion of five years of continuing good service, after adoption of the resolution, had a right to every reasonable consideration for a career appointment. This right, the Panel determined, created a legitimate expectation of continued employment with the Organization.

...

49. While the Panel recognized that the extension of a fixed-term appointment is not in the nature of an entitlement but is completely within the discretion of the Secretary-General, the Panel was of the view that the Appellant's rights were violated when (i) intentionally false and misleading information formed the basis for the non-extension of the Appellant's fixed-term appointment, and (ii) notwithstanding the Appellant had timely availed himself of the rebuttal process and submitted a written rebuttal statement on 18 April 1994 to his PER, the PER, contrary to administrative instruction ST/AI/240/Rev.2, para. 9, was not only included in the Appellant's official status file, but its extremely negative ratings formed the basis for non-extension of his fixed-term appointment.

Conclusions and recommendations

50. Based on the foregoing, the Panel *unanimously agreed* that the procedural irregularities were of such a substantive nature that [they] violated the Appellant's rights as a staff member.

51. The Panel *unanimously agreed* that the decision not to renew the Appellant's fixed-term appointment was tainted by distortions bordering on falsehood and lack of due process.

52. The Panel *unanimously recommends* that memorandum dated 31 March 1994 from ..., Acting Chief Transport Officer, Naqoura, UNIFIL, to ..., Chief Civilian Personnel Officer, UNIFIL, on the subject: Performance evaluation report - FSO [Field Service Officer] Ainsley Toppin, be excised from the Appellant's official status file.

53. The Panel *unanimously recommends* that confidential/no distribution fax cable dated 6 April 1994 from ..., OIC ADM, UNIFIL, to .../FIELDOPS for ..., on the subject: FSO Ainsley Toppin, with attachments, be excised from the Appellant's official status file.

54. The Panel, while cognizant of the impracticality of asking the Administration at this point to undertake the process of constituting a rebuttal panel to consider the rebuttal of the Appellant to his PER in question, *unanimously recommends* that the decision not to extend the Appellant's fixed-term appointment be rescinded and that the Appellant be reinstated with full appropriate compensation payable for the period

of lost employment entailed. While the Panel feels strongly that this course of action should be followed by the Administration, if at all possible, it would recommend in the alternative, should reinstatement prove impracticable, payment of appropriate financial restitution to the Appellant. The panel suggests in this context the payment of full salary and benefits for the period 15 June 1994 to 31 January 1997.

..."

On 13 May 1997, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed him, in part, as follows:

"...

... The Secretary-General took note of the Board's conclusions that the procedural irregularities were of such substantive nature that they violated your rights as a staff member; and that the decision not to renew your fixed-term appointment was tainted by distortions and lack of due process.

Regarding the issue of the non-renewal of your contract, the Secretary-General recalls that staff rule 104.12 (b) (ii) provides that the fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment. Thus, even the most favourable performance evaluation reports create no legal expectancy of renewal of fixed-term appointments. The Secretary-General maintains his authority concerning the renewal of contracts and has therefore decided not to accept the Board's recommendation to rescind the decision not to extend your fixed-term appointment and to reinstate you.

Regarding the issue of irregularities concerning the evaluation of your performance for the period of your temporary reassignment with UNOSOM, the Secretary-General agrees that these were of a substantive nature and have been compounded by the fact that no action was taken to respond, in accordance with established procedures, to your rebuttal of the performance evaluation report for the period in question. For these reasons, the Secretary-General has decided to accept the Board's recommendations in paragraphs 52 and 53 of its report, namely that:

(a) The memorandum dated 31 March 1994 from ..., Acting Chief Transport Officer, Naqoura, UNIFIL, to ..., Chief Civilian Personnel Officer, UNIFIL, on the subject 'Performance Evaluation Report - FSO Ainsley

Toppin' be excised from your official status file;

(b) The confidential/no distribution fax cable dated 6 April 1994 from ..., OIC ADM, UNIFIL, to .../FIELDOPS for ..., on the subject 'FSO Ainsley Toppin', with attachments, be excised from your official status file.

Moreover, because of the above-mentioned procedural shortcomings, the Secretary-General has decided that you be granted compensation equivalent to one year's net base salary at the rate in effect at the time of your separation.

..."

On 25 November 1997, the Applicant wrote to the Under-Secretary-General for Administration and Management inquiring about the status of his compensation payment. He requested that this decision be reviewed and suggested that he would refrain from any further appeal to the Administrative Tribunal if he were granted additional compensation of 12 months of his salary which would amount to a total of 24 months compensation in restitution following the JAB's recommendation in his case.

On 4 December 1997, the Respondent paid the Applicant 12 months net base salary in accordance with the Secretary-General decision dated 13 May 1997.

On 23 July 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to renew his fixed-term contract was based on a PER that was flawed with a variety of procedural irregularities, distortions and abuse of authority.

2. The Applicant had a legitimate expectation of continued employment because of his previous service and good performance.

Whereas the Respondent's principal contention is:

The Applicant was fully compensated for the procedural irregularities which occurred with respect to the non-renewal of the fixed-term contract.

The Tribunal, having deliberated from 29 October to 19 November 1999, now pronounces the following judgement:

I. The Applicant is asking the Tribunal to rule on three requests: to grant him compensation equivalent to 30 months' net base salary, a further indemnity owing to the delay in payment, and $3,000 or more for moral injury.

II. With regard to the compensation which the Applicant is seeking and which he assesses as 30 months of his net base salary, the Tribunal notes that to justify his appeal the Applicant invokes the recommendation of the JAB regarding his good service to the Organization for almost 17 years and the legitimate expectation of employment by virtue of General Assembly resolution 37/126. He also invokes certain procedural irregularities which deprived him of his right to rebut the memorandums finding him professionally incompetent and making critical comments on his behaviour.

III. The Tribunal notes that the Respondent has accepted the recommendations of the JAB, with the exception of the recommendation bearing on the amount of compensation, which it has reduced to one year of the Applicant's net base salary. It has further decided to remove the contested memorandums from the Applicant's file.

IV. The Tribunal, while endorsing the relevant grounds admitted by the JAB and invoked by the Applicant to support his application, recalls nonetheless the provisions of article 9.1 of

its Statute, which stipulates that any compensation fixed by the Tribunal "shall not exceed the equivalent of two years' net base salary of the applicant". It concludes from this that the compensation equivalent to 30 months' net salary sought by the Applicant without adducing exceptional circumstances is not justified.

On the other hand, the Tribunal, taking into account the fact that the documents unfavourable to the Applicant were excised from his file, thereby removing all trace of the accusations made against him, considers that the compensation accorded to him by the Administration is insufficient and decides to fix the entire compensation at 17 months of the Applicant's net base salary, five months being added to the 12 months granted by the Administration.

V. With regard to the compensation sought by the Applicant for the delay, the Tribunal observes that the Applicant has neither proved nor offered to prove the existence of an entitlement on his part but has merely invoked the recommendation of the JAB in order to claim compensation for delay. In this connection, the Tribunal recalls Judgement No. 356, *Giscombe* (1985), where it held that the refusal of a JAB recommendation is completely within the scope of authority of the Secretary-General, who is not bound to give reasons for such a decision.

VI. As to the alleged moral injury, the Tribunal declares it unfounded in the circumstances.

VII. For the above reasons, the Tribunal decides to award the Applicant compensation equivalent to five months of his net base salary at the rate in effect at the time of his separation, to be added to the compensation already received.

VIII. The Tribunal rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Victor YENYI OLUNGU
Member

Marsha ECHOLS
Member

New York, 19 November 1999

Maritza STRUYVENBERG
Executive Secretary